employee as "an individual employed by any employer," *id.* § 630(f), and defines *employer* as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year. . . . " *Id.* § 630(b).

Because NOBRA's administrative staff numbers fewer than 20, NOBRA cannot an employer for ADEA purposes unless its pilot-shareholders are considered employees. NOBRA moved for summary judgment based on the argument that the pilot-shareholders are not employees. The district court and Court of Appeals agreed with NOBRA, concluding that as a matter of law, the pilot-shareholders are not employees of NOBRA for ADEA purposes. Thus, the question of whether the ADEA applies to NOBRA turns on another question: whether NOBRA's pilot-shareholders are NOBRA's employees.

Three years ago, in *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), this Court considered a similar question: whether the shareholder physicians of a professional medical corporation should be considered "employees" for purposes of the Americans with Disabilities Act of 1990 (ADA).

The ADA definitions of *employer* and *employee* analyzed in *Clackamas* are, in all material respects, identical to the ADEA definitions of these terms, except that the threshold number of employees in the definition of *employer* is 15 instead of 20. *See* 42 U.S.C. § 12111(4) and (5)(A). Indeed, the *Clackamas* court noted the similarity of the ADA and ADEA definitions. 538 U.S. at 441 n. 1.

In *Clackamas*, this Court found the definitions of *employer* and *employee* "completely circular," because each

is defined in terms of the other. 538 U.S. at 444. Ultimately, this Court concluded that, when Congress does not "helpfully define" terms like *employer* and *employee*, *id.*, then Congress intended that the courts look to the common-law understandings of these terms. *Id.* at 445. This Court concluded that "the common-law element of control is the principle guidepost that should be followed" to determine whether a shareholder is an employee. *Id.* at 448.

For further guidance, this Court in *Clackamas* looked to EEOC guidelines discussing "both the broad question of who is an 'employee' and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees." *Id.* at 448. The EEOC guidelines listed six factors to be considered in deciding whether a shareholder "acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.* at 449, quoting EEOC Compliance Manual § 605:0009. This Court was "persuaded by the EEOC's focus on the common-law touchstone of control" to adopt the EEOC's six factors "relevant to the inquiry whether a shareholder-director is an employee":

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;

- Whether the parties intended that the individual be an employee, as expressed in written agreements or contract; and
- Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-50, quoting EEOC Compliance Manual § 605:0009. These six factors, the Court recognized, are not necessarily "exhaustive." *Id.* at 450 n. 10. Rather, the answer to whether a shareholder-director is an employee depends on "all of the incidents of the relationship . . . with no one factor being decisive." *Id.* at 451, quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 324 (1992) and *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Here the Court of Appeals, faced with the question of whether NOBRA's pilot-shareholders are employees, faithfully followed this Court's lead in *Clackamas*. *See* App. 16-20, *Coleman v. New Orleans & Baton Rouge Steamship Pilots' Assn.*, 437 F.3d 471, 480-82. Recognizing that the six factors are not necessarily exhaustive, the court nevertheless found that all six weigh against classifying the pilot-shareholders as employees. App. 20, 437 F.3d at 481. Whatever is said about the Court of Appeals' analysis, it cannot be said that the court misstated the law.

Indeed, Coleman himself does not contend that the Court of Appeals misstated the law. Instead, he suggests that the court's focus on *Clackamas* was incorrect, and that the court should instead have applied *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992). *See* Pet. at 11. But he fails to explain why *Darden* is a more apt precedent than *Clackamas*.

A reading of both decisions reveals that, contrary to Coleman's unsupported assertion, *Clackamas* is the more apt precedent for this case. The issue in *Darden* was whether an insurance salesman was an employee or an independent contractor for ERISA purposes. The issue in *Clackamas* was whether shareholder-director physicians were employees of their medical corporation for employment anti-discrimination purposes. The issue in this case – whether NOBRA's pilot-shareholders are employees – more closely resembles *Clackamas* than *Darden*. Indeed, in *Clackamas* this Court repeatedly suggested that its holding was not confined to the ADA, but would apply to other anti-discrimination statutes, particularly the ADEA:

- Footnote 1 of *Clackamas* points out the similarity between the definitions of *employer* in the ADA and ADEA.
- Footnote 3 of *Clackamas* observes that the "disagreement in the Circuits" resolved in *Clackamas* "is not confined to the particulars of the ADA," citing an ADEA opinion of the Second Circuit, *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986).
- The EEOC Compliance Manual, from which the Court borrowed the six factors discussed above, "states that it applies across the board to other federal antidiscrimination statutes," including the ADEA. 538 U.S. at 449 n. 7.

In short, this case does not involve a legal question that is unsettled. Rather, the question was settled just three years ago in *Clackamas*. This Court's message was clear and was understood and followed by the Court of Appeals.

B. There is no conflict between the Fifth Circuit's decision here and the Second Circuit's decision in *EEOC v. Joint Apprenticeship Committee*, because the two decisions addressed separate issues.

On pages 10-11 of his petition, Coleman suggests that the Court of Appeals' decision here conflicts with that of the Second Circuit in *EEOC v. Joint Apprenticeship Committee*, 186 F.3d 110 (2nd Cir. 1998). But no such conflict exists, because the two decisions address separate issues.

Unlike the Fifth Circuit here, the Second Circuit did not consider whether the defendant, the Joint Apprenticeship Committee (JAC), was an "employer" for purposes of federal anti-discrimination statutes (in that case, Title VII). Rather, it appears that JAC's status as an employer was not contested. The only issues decided by the Second Circuit were the sufficiency of the EEOC's summary-judgment evidence on liability and the district court's refusal (for reasons of untimeliness) to allow the JAC to offer contradictory evidence.[5]

Since the Second Circuit's decision resolved issues completely different from the single issue decided by the Fifth Circuit here, the two decisions cannot possibly conflict.

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[5] To guide the district court on remand, the Second Circuit also addressed the issue of backpay, which had been raised by the parties on appeal. *See* 186 F.3d at 122-23. That issue, like the others discussed by the Second Circuit, is not addressed in the Fifth Circuit's decision here.

CONCLUSION

The question raised in this case has already been addressed by this Court in *Clackamas*, a three-year-old decision. Coleman has not demonstrated any need for this Court to revisit the question so soon. Indeed, he seeks no change, development, or refinement of the law governing employment discrimination. The only thing he seeks is a second layer of appellate review, to correct what he contends to be a misapplication of settled law to a specific, relatively rare set of facts – state-created institutions governing pilots on the Mississippi River.

NOBRA suggests that this Court deny Coleman's petition.

Respectfully submitted,

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